UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

STAR MARIANAS AIR, INC., Complainant, v. COMMONWEALTH PORTS AUTHORITY, Respondent.	Docket DOT-OST-2021-0138

RESPONDENT'S STATEMENT OF POSITION AND BRIEF

Please serve:

Scott P. Lewis
Timothy J. Roskelley
Mina S. Makarious
Paul M. Kominers
Ezra Dunkle-Polier
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, Massachusetts 02109
T: 617.621.6500
F: 617.621.6639
slewis@andersonkreiger.com
troskelley@andersonkreiger.com
mmakarious@andersonkreiger.com
pkominers@andersonkreiger.com
edunkle-polier@andersonkreiger.com

Robert T. Torres
TORRES LAW GROUP
Plata Drive
Whispering Palms (Chalan Kiya)
P.O. Box 50375 CK
Saipan, MP 96950
T: 670.234.7859
F: 670.234.5749
robert.torres@rttlawgroup.com

Counsel for Commonwealth Ports Authority

November 5, 2021

TABLE OF CONTENTS

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

STAR MARIANAS AIR, INC., Complainant, v. COMMONWEALTH PORTS AUTHORITY, Respondent.	Docket DOT-OST-2021-0138

RESPONDENT'S STATEMENT OF POSITION AND BRIEF

The Respondent Commonwealth Ports Authority ("CPA" or the "Authority") asks the Department of Transportation (the "Department") to dismiss the Complaint filed by Star Marianas Air, Inc. ("SMA"). SMA has not made any showing that its Complaint presents a "significant dispute" or that its claims have any merit. As the evidence offered by CPA shows, there is no significant dispute, the challenged rates and charges are reasonable, and consultation was adequate.

SMA's Complaint is a remarkably poor vehicle for the resolution of important issues about airport rate-setting in an expedited proceeding under 49 U.S.C. § 47129 for all of the following reasons:

- The compensatory methodology SMA challenges produces *lower* fees in the current fiscal year than the residual agreement would have yielded.
- The dispute arises at three small airports.
- SMA is the only air carrier challenging CPA's new rate-setting method.

- The total amount of fees to be charged to SMA in 2022 is only $126,807.
- SMA has not paid any fees (other than PFCs) to CPA for the past six years and currently owes CPA $2,606,428.
- CPA's compensatory methodology was developed by experts and complies with FAA's Rates and Charges Policy.
- SMA has not raised any cogent arguments that the CPA's rate methodology is unreasonable.
- FAA has previously reviewed and endorsed CPA's compensatory approach.
- SMA did not offer testimony on any disputed issue or submit a brief to the Department when it filed its Complaint.[1]
- SMA's allegations that CPA did not provide adequate consultation are unsupported by the facts and could not justify the relief SMA seeks.

SMA's Complaint should therefore be dismissed.

Argument

I. SMA'S COMPLAINT DOES NOT PRESENT A "SIGNIFICANT DISPUTE."

The statute governing this proceeding provides that "[w]ithin 30 days after such complaint is filed with the Secretary, the Secretary *shall dismiss* the complaint if no significant dispute exits . . . ." 49 U.S.C. § 47129(c)(2) (emphasis added). As the Department pointed out in its Discussion of Comments on its New Rules of Practice for Proceedings Concerning Airport Fees:

> Congress established the extraordinary dispute resolution program in § 47129 to ensure that carriers and airports can obtain a prompt decision when there is an *important* fee dispute. It plainly understood that the Department has limited resources; if the expedited procedures are employed any time a complainant can

[1] In contrast, in support of its Answer, CPA has submitted an Appendix of Evidence containing the Declaration of Skye Hofschneider ("Hofschneider Decl.") and the Declaration of Bonnie Ossege ("Ossege Decl.), along with 18 supporting documentary exhibits marked Exhibits CPA-1 through CPA-18.

> state a claim or establish that there is a fact in dispute, the Department could be unable to respond adequately when there are truly significant fee disputes.

60 Fed. Reg. 6919, 6921 (Feb. 3, 1995) (emphasis added).

It is not surprising that the expedited "rocket docket" procedures established under § 47129 have rarely been invoked, and the Department has only found that the complaints in six cases presented significant disputes: *Air Transport Association of America v. City of Los Angeles* ("*LAX I*"), Instituting Order, Order 95-4-5, at 17 (Apr. 3, 1995); *Puerto Rico Ports Authority Rates Proceeding* ("*Puerto Rico*"), Instituting Order, Order 95-4-6, at 14 (Apr. 3, 1995); *Air Transport Association of America v. City of Los Angeles* ("*LAX II*"), Instituting Order, Order 95-9-24, at 17 (Sep. 22, 1995) ; *Miami International Rate Proceeding* (*"Miami"*), Instituting Order, Order 96-12-23, at 22 (Dec. 19, 1996); *Brendan Airways, LLC v. The Port Authority of New York and New Jersey* ("*Newark*"), Instituting Order, Order 2005-3-21, at 20-21 (Mar. 16, 2005); *Alaska Airlines, Inc. v. Los Angeles World Airports* ("*LAX III*"), Instituting Order, Order 2007-3-13, at 28 (Mar. 16, 2007). In two other cases that posed more sophisticated issues and had more at stake than the present proceeding, the Department declined to exercise this extraordinary grant of jurisdiction. *See Delta Air Lines, Inc. v. Lehigh-Northampton Airport Authority*, Order of Dismissal, Order 95-5-8, at 18 (May 4, 1995); *Trans World Airlines, Inc. v. City and County of Denver* ("*Denver*"), Order of Dismissal, Order 95-7-27, at 17-18 (July 21, 1995).

In determining whether SMA's Complaint presents a "significant dispute," the Department should consider a number of factors: the impact of the contested change in rate methodology; the number of carriers complaining about the new fees; the size of the airport involved; the amount in dispute; the importance of the issues raised; any previous rulings by the Department on the disputed rate methodology; and the quality of the evidence SMA has

submitted. Every single one of these factors points to the same conclusion: SMA has not presented a significant dispute to the Department.

Impact of Change in Rate Methodology. When an air carrier complains that a new rate methodology is unreasonable, as SMA does in this case, the Department would surely presume that the change in rate-setting approach has caused the complaining airline's rate burden to increase, as the change from residual to compensatory rate-setting did at LAX in 1993. *See LAX I*, Instituting Order at 17 (finding significant dispute as to 300% increase in landing fees); *LAX II*, Instituting Order at 16-17 (same for approximately 33% increase in landing fees). In this unusual case, however, the change from residual to compensatory rate-setting currently works to SMA's advantage.

After receiving SMA's Complaint, the Authority asked its financial consultants at Ricondo & Associates ("Ricondo") to compute how SMA's total billings for use of its three Airports under the new compensatory rate methodology would compare to what SMA's total billings would have been if the Authority had calculated fees for FY 2022 using the previously agreed-upon residual rate methodology prescribed by the Airline Use Agreement ("AUA"), which CPA terminated as of September 30, 2021. Because the form of the charges under these two methods is different,[2] the easiest way to compare the rate burdens that would be borne by various airlines, including SMA, under the two methodologies — and to show how the rates differ **solely as a result of the change in methodology** — is to calculate the projected "CPE"

[2] Under the AUA, only a "facility charge" levied on a per-passenger basis was used to recover terminal costs, while under the new compensatory method, the Authority will mainly charge airlines on a square-footage basis for their assigned space in the terminal, plus certain "joint use" or "common use" charges that will be levied on a per-passenger basis. *See* Ossege Decl. ¶ 9.

(cost per enplaned passenger) under each of the two methodologies using exactly the same financial inputs.[3] *See* Ossege Decl. ¶ 9.

Ricondo computed SMA's projected CPE for FY 2022 under each of the two rate-setting methodologies using exactly the same inputs for debt service and M&O expenses, enplaned and deplaned passengers, landed weight, airline leased or assigned space, and non-airline revenues.[4] This allowed Ricondo to measure the impact of the change in rate methodology. Ricondo found on this basis that, for SMA, the CPE for FY 2022 under the compensatory method now in effect would be **$10.97** while SMA's CPE under the agreed-upon residual method would be **$20.30**, or almost twice as much.[5] Ossege Decl. ¶ 11.

The principal reason why the results of the compensatory method are so much more favorable to SMA (and the other airlines) for FY 2022 is that under the now-terminated residual agreement, in exchange for receiving the benefit of non-aeronautical revenue, the airlines agreed to cover all the Airports' costs, including the costs of non-aeronautical space and facilities. *Id.* As SMA acknowledges in ¶ 20 of its Complaint, under a residual agreement, like the one SMA executed, "the air carriers agree to cover any shortfalls if the nonaeronautical revenue is insufficient to cover airport costs." For FY 2022, Ricondo projects such a shortfall of

---

[3] "CPE" is generally accepted by airlines as a measure of the cost impact of different rate methodologies and is often used by airlines to compare the costs of operating at various airports. *See* Ossege Decl. ¶ 9, n.1.

[4] To put things on an equal basis, Ricondo eliminated from its calculations of CPEs the effect of applying federal stimulus funds to reduce the revenue requirement, because there is no way of knowing how CPA would have applied federal funds in FY 2022 if it were still operating under a residual agreement. Ricondo also assumed in both calculations that CPA was waiving payments of landing fees and terminal rentals for the first quarter of FY 2022, as CPA in fact is doing. *See* Ossege Decl. ¶ 10.

[5] SMA's actual CPE in FY 2022 is projected to be only $3.31 — much less than $10.97 — because CPA has, in fact, applied federal stimulus funds to drastically reduce its overall airline revenue requirement for this year. *See* Ossege Decl. ¶ 11, n.2.

approximately $5.2 million before application of any federal stimulus funds, mainly as a result of pandemic-related reductions in air travel. In short, Ricondo's analysis confirms that for FY 2022, SMA has been benefitted, not harmed, by CPA's change in rate-setting methodology.[6] Ossege Decl. ¶ 11. If CPA had not terminated the AUA effective September 30, 2021 and had continued to use the agreed-upon residual method in FY 2022, SMA's rate burden would have been *much higher* than it will be under the new compensatory rate structure.

The Department has never found that it should review a change in rate methodology that benefits a complaining airline.[7] *Compare LAX I*, Instituting Order at 17 (where change from residual to compensatory rate-setting method resulted in abrupt increase in landing fees). SMA may argue that in future years, the new compensatory method could lead to higher rates than it agreed to pay under the now-terminated AUA. Such an argument, of course, is entirely speculative and of no consequence. If the current rates imposed by CPA comply with the Rates

---

[6] To validate this conclusion, Ricondo examined a similar set of calculations using each of the two competing rate-setting methodologies, but instead of using *projected* budgetary allowances and forecasts of airline activity for FY 2022, Ricondo used *actual numbers* for FY 2019. Ossege Decl. ¶ 11, n.3. Their results were very similar. For 2019, SMA's CPE would have been $7.50 if the rates had been calculated using the compensatory methodology now in effect, while the comparable figure using the residual method is $8.35. The principal reason why the residual method produces a higher CPE in 2019 is that Typhoon Yutu caused significant damage to the CNMI and in particular the Saipan International Airport. Typhoon Yutu caused a power outage there and suspension of scheduled operations that lasted nearly a month. This shut down caused a decrease in passengers compared to the previous year, which in turn decreased the nonaeronautical revenues generated by passengers that are available to offset the operating and capital costs in a normal year. There were also additional unanticipated operating and capital costs attributable to the typhoon. *Id.*

[7] Even when rate increases have been challenged, the Department has limited review under § 47129 to complaints that challenge *large* increases. *See Denver*, Order of Dismissal at 17 (dismissing challenge to 5.5% increase); *Allentown*, Order of Dismissal at 18 (same, 7% increase). The smallest alleged increase in any case the Department has determined raised a significant dispute was a 24% increase in rent—paired with a 54% increase in landing fees, *Puerto Rico*, Instituting Order at 14. The most recent previous proceeding under § 47129, *LAX III*, involved increases of at least 100% (for some airlines) and 300% (for others) in terminal rental rates. *See LAX III*, Instituting Order at 21.

and Charges Policy, as they do, SMA has no right to complain, no matter what the future rate differential may turn out to be.

Number of Complainants. SMA is the only air carrier that has filed a complaint challenging the new rate methodology that took effect at CPA's three airports on October 1, 2022. All the other air carriers signaled five years ago that they were content with the new compensatory rate methodology and the accompanying Operating Agreement, *see* Hofschneider Decl. ¶¶ 10-12, and none of these carriers filed their own complaints with the Department or attempted to join SMA's Complaint.

SMA is projected to enplane only about 38,000 passengers in FY 2022, accounting for just a fifth of the passengers that are expected to board commercial aircraft at CPA's three airports this year. *See* CPA Ex. 17 at 4. *See Denver*, Order of Dismissal at 17 (finding no significant dispute existed with respect to claims by a single airline).

Size of Airports. This proceeding involves three small airports. Saipan is a small-hub airport, and both Rota and Tinian are non-hub airports. *See National Plan of Integrated Airport Systems (NPIAS), 2021-2025* at Appendix A-115, *available at* https://www.faa.gov/airports/planning_capacity/npias/current/media/NPIAS-2021-2025-Appendix-A.pdf. During FY 2022, these three airports combined are projected to serve only about 200,000 passengers and have total budgeted expenses combined (for all cost centers) of only about $14 million. *See* Ex. CPA-17 at 4, 6, 8. The Department has never exercised its jurisdiction under § 47129 to resolve fee disputes at airports even remotely as small as these three. In fact, every single proceeding in which the Department has found a significant dispute has arisen at a major, large-hub airport. *See LAX III*, Instituting Order at 21 (explaining that the

Department had instituted proceedings involving the nation's two largest metro areas (New York and Los Angeles) and three of its busiest airports (LAX, EWR, and MIA)).

Amount in Dispute. The amount of the fees challenged in a Part 302 proceeding is "a meaningful measure to use in gauging the significance of a dispute." *Denver*, Order of Dismissal at 17; *see also LAX III*, Instituting Order at 21, and orders cited (reviewing amounts at issue in previous significant disputes). It is impossible to discern from SMA's Complaint how much money is actually at stake in this proceeding. SMA's sole allegation on the amount at stake is that it "anticipates that its costs . . . will increase dramatically." Compl. ¶ 62.[8] It turns out, however, that the answer is "hardly any at all." As CPA's expert witness, Bonnie Ossege, has shown, SMA's total rate burden for FY 2022 — the sum of all the landing fees and terminal rentals CPA projects it will charge to SMA — will be a paltry **$126,807**. Ossege Decl. ¶ 12.[9] Although SMA has not paid anything besides PFCs to CPA for more than five years, Hofschneider Decl. ¶ 24, SMA does not claim that it should be allowed to use CPA's airport system for free, so the actual amount in dispute is presumably much less than $126,807. This pales in comparison to the contested amounts in the previous proceedings in which the Department found there was a significant dispute. The smallest amount of increase that gave rise to a significant dispute was $22 million in the 2005 complaint against the Port Authority of New

---

[8] If the impact were as large as SMA suggests, "presumably at least some of [the] other carriers would have taken the opportunity to dispute the increase in this proceeding." *Denver*, Order of Dismissal at 17. None did.

[9] SMA's projected rate burden for FY 2022 is as low as it is for three reasons: (1) as the Department noted in its Scheduling Order, to provide relief to all the carriers serving its airports, the Authority elected to waive all rates and charges (other than PFCs) for the first quarter of FY 2022 (through December 31, 2021); (2) the Authority has also applied federal stimulus funds associated with the COVID-19 pandemic to eliminate any charge for capital costs and to slash the allowance for M&O expenses in the current rates; and (3) to provide relief to SMA alone, the Authority discounted the charges for commuter landing fees by 40% and commuter terminal rental charges by 60%. *See* Ossege Decl. ¶¶ 7-8.

York and New Jersey. *Newark*, Instituting Order at 20. Other disputes the Department has deemed significant have had as much as $6 billion at stake. *Id.*, citing *Miami* Instituting Order at 22. In contrast, the Department dismissed complaints that involved $65,000 in *Allentown* (Order of Dismissal at 17-18) and $304,800 in *Denver* (Order of Dismissal at 17).

Importance of Issue. SMA's Complaint does not raise any important issues. Instead, it reveals SMA's misunderstanding of well-established rate-setting principles. The theme of the Complaint is that CPA is improperly charging SMA for airport facilities it does not need or use. SMA may not need all the facilities CPA must provide to comply with the requirements of its Part 139 certificates at each of its three airports, but this gives SMA no more reason to complain than if it sought to avoid paying landing fees that cover the costs of runways that are longer than SMA's commuter aircraft require. *See below*, Pt. II.B; Ossege Decl. ¶ 14.

This case does not provide a good opportunity for the Department to issue guidance to other airport sponsors on unresolved airport rate-setting issues. It is nothing like *LAX I*, *LAX II* or *LAX III*, for example, where the Department addressed foundational issues that the Department and the FAA (and even the courts) have grappled with for years about the kinds of costs that can lawfully be recovered when rates are set by tariff. *LAX I*, Instituting Order at 24; *LAX II*, Instituting Order at 20-21; *LAX III*, Instituting Order at 25-27. *Puerto Rico* involved serious, substantiated allegations of revenue diversion as well as complicated cost allocation issues. *Puerto Rico*, Instituting Order at 6, 8-9, 14, 19-20. *Miami* addressed important issues concerning equalized terminal rental rates and the allocation of airport costs between a hub carrier and other airlines. *Miami*, Instituting Order at 23-24. *Newark* raised similar issues of cost allocations between a hub carrier and other airlines, and drew the concern of international carriers and even the European Commission. *Newark*, Instituting Order at 20, 22-23. Here, all

the other airlines serving the CPA Airports appear to be content with CPA's compensatory methodology. There is no good reason for the Department to use this peculiar case as an occasion to make broad pronouncements about proper methods of compensatory rate-setting.

Prior FAA Review. This is not the first time SMA has sought review of CPA's rate-setting by the Department. Several years ago, SMA brought its grievances to FAA. In May 2020, the FAA's Director of Airport Compliance and Management Analysis (the "Director") dismissed every allegation in SMA's Part 16 complaint. *See* Hofschneider Decl. ¶ 15 & Ex. CPA-7. The Director's findings included a review of CPA's rate methodology which led the Director to conclude that "nothing in these documents appears to conflict with acceptable methodologies for establishing airport rates and charges with airlines" and that the "Ports Authority's compensatory methodology used to establish the airport's rates and charges, and fees is fair and reasonable." Ex. CPA-7 at 13. The 2015 Rate Study reviewed by the Director displays essentially the same methodology Ricondo used to calculate the fees that are in dispute in this proceeding, as the Department can easily see by comparing Ex. CPA-8 (2015 Rate Study) with Ex. CPA-17 (2022 Rate Study). *See* Hofschneider Decl. ¶ 15; Ossege Decl. ¶ 21. The Director's Determination was upheld by FAA's Associate Administrator for Airports. *See* Ex. CPA-9. There is no justification for the Department to provide another forum for SMA to challenge CPA's rate methodology.

Deficiencies in SMA's Submission. The Department also looks to the volume of the evidence and thoroughness of the parties' arguments in assessing whether a significant dispute exists. *Compare Allentown*, Order of Dismissal at 18 ("The Airlines do not offer any comprehensive calculations to dispute the Authority's calculations" or explanation as to impact of subsidy in dispute), *with LAX I*, Instituting Order at 17 ("Given the opposing arguments made

by the City and the Complainants, and the volume of evidence, case citations, and argument submitted by each side in support of its position as to the reasonableness of the fees, we cannot conclude at this time that there is no dispute warranting further consideration at a hearing.").

In this case, SMA has provided essentially no testimony and did not submit any statement of position or brief to support its claims, as required by 14 C.F.R. § 302.603. Remarkably, the only testimony offered by SMA is a one-paragraph declaration that merely establishes the undisputed facts that (a) SMA is a certificated air carrier that provides service to the Islands of Saipan, Rota, Tinian and Guam; (b) SMA is a tenant and user of terminals at each of CPA's three airports; and (c) SMA only flies small aircraft and "does not require airports to be certificated under 14 CFR § 139 nor to have any airport class rating." Declaration of Robert Christian, Compl. at 21. This is worse than the complaint in *Allentown* (Order of Dismissal at 18), where the complainants failed to explain how the policy they challenged increased their fees, or *Denver* (Order of Dismissal at 18-20), where the complainant failed to present evidence refuting the City's position. Both the *Denver* and *Allentown* complaints were dismissed, and the Department should do the same here.

The expectation that a complainant will lay out its entire proof at the outset of the proceeding is fundamental to Part 302 and exists because "[i]n view of the extremely short decisional deadlines imposed by the FAA Authorization Act, it is important that [the Department] ha[s] the most information possible at the beginning of a proceeding." Rules of Practice for Proceedings Concerning Airport Fees, 60 Fed. Reg. at 6920. In decision after decision, the Department has reiterated this principle, and reminded parties to "assist [the Department] and themselves in future proceedings of this nature by expressly alleging and proving the elements of their cases at the outset." *See, e.g., Allentown*, Order of Dismissal at 14;

Denver, Order of Dismissal at 19; *Newark*, Instituting Order at 22-23, 25-26. SMA'S failure to offer any testimony in support of the many allegations of its Complaint cannot possibly be excused by CPA's alleged failure to give SMA enough information to make out its claims.[10] SMA carries both the initial burden of production and the ultimate burden of proof in this proceeding. *See Port Auth. of N.Y. & N.J. v. Dep't of Transp.*, 479 F. 3d 21, 42–43 & n.17 (D.C. Cir. 2007). On this record, the Department could not possibly find that SMA has met its burden of proof.[11]

For all of these reasons, the Department should determine that SMA has not presented a significant dispute and dismiss SMA's complaint.

---

[10] The Department's regulations, 14 C.F.R. § 302.603(c)(3), do permit a complainant some relief from the obligation to include all information with its complaint when "the information has been omitted because the airport owner or operator has not made that information available to the carrier." But the Department should not permit SMA to rely on this exception because SMA's claims that CPA withheld information are both formally deficient and substantively dubious.

A complainant who intends to rely on the exception in 14 C.F.R. § 302.603(c)(3) must certify "the date and form of the carrier's request[s] for [the necessary] information from the airport owner or operator." SMA's certification, however, is generic; it says only that "[t]o the extent there is information on which [SMA] intends to rely that is not included with the Complaint, or exhibits that are not attached to this Complaint, such information was omitted because the CPA has failed to make it available to [SMA] despite numerous requests for the information by [SMA]." Compl. at 19. This "general reference . . . does not relieve complainant[] of the need to outline the specific information that [it] believe[s] is necessary in [its] evaluation of the fee increases." *Newark,* Final Decision, Order 2005-6-11, at 15 (June 14, 2005).

[11] SMA cannot cure this deficiency by offering testimony in its reply that should have been included with its complaint. *See, e.g.*, *Newark,* Second Order on Evidentiary Matters, 2005 WL 7751915, at *2 (Mar. 28, 2005) (striking matter submitted with reply that could have been submitted with complaint, and reiterating that "the Complainants failed to comply with the rules and have attempted to overcome the deficiencies of their pleadings by expanding on their Reply Declarations. We will not allow Complainants to circumvent the rules and their failure to make proper submissions at the time of the filing of their Complaint").

II. THE AUTHORITY'S COMPENSATORY RATE-SETTING METHODOLOGY IS REASONABLE.

A. The Challenged Fees Were Properly Calculated Using a Lawful Compensatory Methodology.

The compensatory rate methodology used to calculate FY 2022 rates and charges was developed for the Authority by Ricondo & Associates, a nationally-recognized airport consulting firm, beginning in 2015. *See* Hofschneider Decl. ¶ 5; Ossege Decl. ¶¶ 2, 19. Ricondo calculated the Fiscal Year (FY) 2022 airline rates and charges for all three of the airports CPA owns and operates. The compensatory rate-setting methodology Ricondo used and the results of its calculations are set forth in a report provided to the Authority titled "Proposed Fiscal Year 2022 Airline Rates and Charges Analysis" (the "2022 Rate Study"), Exhibit CPA-17.[12] This rate methodology complies with FAA's Rates and Charges Policy, as CPA's expert has testified. *See* Ossege Decl. ¶ 4.

1. The Method Used to Calculate FY 2022 Rates.

As directed by the Authority, and as the 2022 Rate Study details, Ricondo used an industry-standard compensatory methodology to calculate the FY 2022 rates and charges. *Id.* ¶ 5. They first allocated capital costs (debt service, amortization and expensed capital) and maintenance and operation ("M&O") expenses to various "cost centers," reflecting principles of cost causation consistent with industry practice and the Rates and Charges Policy. The cost centers used are described in Section 2 (pp. 2-3) of the Rate Study. The amount of debt service

[12] SMA may complain that the Authority did not provide a copy of this particular rate study to SMA before imposing the new rates. SMA did, however, provide a nearly identical rate study to SMA five years ago. *See* Hofschneider Decl. ¶¶ 6-11; Ossege Decl. ¶¶ 19-21. The 2015 Rate Study was the subject of extensive discussion with SMA. *Id.* It was reviewed by FAA and found to be unobjectionable. CPA delayed implementation of the new method for five years because of concerns raised by SMA. *See below*, Pt. III.

is discussed in Section 4, and the allocation of debt service is displayed in Table 3 (pp. 5-7). M&O expenses are discussed in Section 5, and the allocation of M&O expenses is displayed in Tables 4.1 and 4.2 (pp. 8-11).

To calculate landing fees, Ricondo used the industry-accepted method of dividing the net airfield revenue requirement (after accounting for PFCs and federal stimulus funds) by projected landed weight, as explained in Section 8.1 of the Rate Study (p. 18). Ricondo made this calculation for all three of the Airports combined. Based on its discussions with the Authority, Ricondo understood that the Authority wished to keep rates for commuter airlines such as SMA as reasonable as possible. Ricondo worked with the Authority to develop a methodology that serves that goal by differentiating the landing fees so that the landing fees applicable to commuter carriers that use the Commuter Terminal in Saipan and the airports in Rota and Tinian are discounted by 40% from the landing fee charged to international carriers that operate in Saipan. SMA is currently the only commuter carrier serving the Airports. *See* Ossege Decl. ¶ 9.

To calculate terminal rental rates, Ricondo divided the net terminal revenue requirement (after accounting for PFCs and federal stimulus funds) by total rentable space in all the terminals combined, as explained in Section 8.2 of the Rate Study (p. 20) and displayed in Table 11. (The Saipan Airport has two passenger terminals: the "Main Terminal" serves international air carriers, and the "Commuter Terminal" serves local carriers serving only the Northern Mariana Islands.) Ricondo differentiated terminal rental rates so that the Commuter Terminal, Rota and Tinian rental rates are 60% less than the rates applied to space in the Main Terminal in Saipan. These rental rates must be paid on the basis of the square footage of space assigned to individual airlines on a preferential basis in their letters of authorization. Ricondo also calculated "common use" charges to be paid by airlines using certain terminal space on a common use basis. These

charges were calculated by multiplying the amount of common use space in each terminal by the applicable rental rate. The total common use charges are then allocated to the users of the common use space on the basis of each airline's proportionate share of total enplaned passengers. The common use charges for FY 2022 are displayed in Table 12 (p. 22). Ossege Decl. ¶ 4.

SMA could not possibly show that this rate-setting approach violates applicable rules or unlawfully discriminates against SMA in any way.

2. Pandemic-Related Rate Reductions for FY 2022.

For FY 2022, the Authority made two decisions which greatly reduced the rates to be charged to all air carriers serving its airports, including SMA.

First, the Authority has applied federal stimulus funding to massively reduce the revenue requirements at each of its three airports. The Authority has received awards from the federal government through the Coronavirus Aid, Relief, and Economic Security Act, the Coronavirus Response and Relief Supplemental Appropriations Act and the American Rescue Plan Act of 2021. The Authority has elected to apply $857,299 in federal funding to offset the costs of debt service that would otherwise have been included in the rate base for FY 2022 after accounting for the application of PFC revenue. The result is that there is no charge whatsoever for debt service in the FY 2022 rates. *See* Ex. CPA-17 at p. 5. The Authority has also elected to apply $10,194,107 in federal funding to offset the maintenance and operation ("M&O") expenses that would otherwise have been included in the rate base for FY 2022. The result is that total M&O expenses were reduced by approximately 80%, to just $2,556,001. *See* Ex. CPA-17 at pp. 8-11. *See* Ossege Decl. ¶ 5.

Second, to provide additional relief for all the air carriers serving its airports, the Authority, elected to waive the payment of all rates and charges (except PFCs) throughout its

airport system from June 1, 2021 through December 31, 2021. The effect of this decision is that for FY 2022, all air carriers, including SMA, have been given an additional 25% discount in their rate burden because they will not be charged for their use of the airport system during the first quarter of FY 2022. *See* Ossege Decl. ¶ 5.

SMA will benefit enormously this year from CPA's decision to provide this rate relief.

B. SMA Misunderstands Applicable Rate-setting Rules.

SMA's main complaint is that CPA charges SMA for facilities which are not "necessary" for SMA's operations. *See* Complaint ¶¶ 17-18; 41. SMA apparently believes that this is improper because, according to SMA, CPA may only include "costs that Star Marianas causes to be incurred" in the calculation of the fees SMA must pay to use CPA's Airports. *Id*. ¶¶ 40-41. This position betrays a fundamental misconception of basic airport rate-setting principles, has been rejected by the authorities SMA itself cites in support of its position, and is flatly inconsistent with well-accepted industry practice.

SMA muddles two distinct aspects of airport rate setting: the allocation of costs among *cost centers*, and the establishment of charges for particular *airport users*. Airport sponsors take cost-causation into account when allocating costs to different cost centers*;* they do not separately calculate rates on this basis for different types of aeronautical users who have access to the same facilities. *See* Ossege Decl. ¶ 14; Rates and Charges Policy, ¶ 2.4.5. SMA has access to longer runways than it might "need" at CPA's Airports, but SMA could not complain about paying its share of actual runway costs because the runways are available for and provide benefits to SMA. The same principle applies, for example, to the recovery of the costs of ARFF units. The ARFF units staffed by CPA may not be required by SMA, but in the event of an accident, SMA will be glad they are there. CPA is unaware of any Part 139 certificated airport in the United States that has calculated a separate landing fee for commuter carriers because these carriers do not require

the enhanced facilities that must be provided by the operators of Part 139 certificated airports. *See* Ossege Decl. ¶ 14.

CPA's methodology is consistent with, not contrary to, the Sixth Circuit's decision in *Northwest Airlines, Inc. v. County of Kent, Mich*., 955 F.2d 1054, 1057 (6th Cir. 1992), *aff'd.*, 510 U.S. 355 (1994) — which SMA perplexingly and incorrectly offers support of its position (Compl. ¶ 17). The Court of Appeals properly rejected the theory SMA advances in this proceeding:

> The defendants assert that since the Airport would not be required to maintain CFR facilities if only general aviation aircraft used the facilities, general aviation should not share the burden of paying for the services. This position fails to account for the fact that CFR [Part 139] facilities are provided and maintained and service general aviation. The CFR facilities answer and service non-airline calls and rescues. These services increase the cost of maintaining and providing CFR services. If the CFR only responded to commercial airline rescue calls, then the 100% allocation would be appropriate. Charging the Airlines for 100% of the cost of CFR services where general aviation and concessionaires, such as car rental companies, receive a substantial benefit is "unreasonable" under the terms of the AHTA. The fact that the CFR services are initially provided because of regulations requiring the services for commercial airlines does not validate allocating the costs of such services only to those airlines when the service provided is adequate to cover all aircraft which use the Airport.

See also Union Flights, Inc. v. San Francisco International Airport, Docket No. 16-99-11, 2000 WL 311170 (F.A.A.), Director's Determination at 17 (Feb. 15, 2000) (small, fixed-wing operator must pay for its share of Part 139-mandated emergency service costs because "operators of small fixed-wing aircraft certainly benefit from the availability of such services at the Airport, if only prospectively in case of an operational emergency"). With the advice of consultants with decades of experience in airport rate setting (Ossege Decl. ¶ 2), properly applied these well-established principles. Ossege Decl. ¶¶ 5, 14. There is no basis for SMA's claim that CPA has improperly charged for the costs of facilities SMA does not "require."

C. CPA Has Given SMA Special Rate Relief at the Rota and Tinian Airports.

In ¶ 45(a) of its Complaint, SMA alleges that SMA has improperly included the costs of the passenger screening areas in Rota and all "common use space" in the airports in Rota and Tinian in the terminal rental rate being charged to SMA, even though SMA does not and could not use all this space. Ricondo worked with the Authority to determine the actual usage of the Rota and Tinian facilities. The space in the Rota terminal shown as "passenger screening area" on Exhibit CPA-18 is not being used for passenger screening, but instead is actually used by SMA as passenger circulation space. Accordingly, Ricondo treated that area as "common use space" for rate-setting purposes. Ossege Decl. ¶ 16. Because SMA is currently the only user of Rota, only its passengers use that space and as a result they are responsible for all of its costs. The annual cost of that space for FY 2022 is, however, only $1,754, after applying federal stimulus funds. *Id.*

SMA alleges in ¶ 46 of the Complaint that because SMA is the only airline currently using the "common use" space in the Rota and Tinian terminals, CPA should not allocate the total expense of that "common use" space to SMA. Allocating the total costs of "common use" facilities among the users based on their proportionate share of usage of those facilities is in accordance with the FAA's Rate and Charges Policy, even if there is only one user of the space during a specific timeframe. Ossege Decl. ¶ 17. CPA nevertheless recognizes that even though SMA captures all the inter-island commuter fare revenue as the sole provider of air transportation to Rota and Tinian, SMA also bears the total burden of the "common use" space in Rota and Tinian. To provide some relief to SMA, Ricondo worked with CPA to remove a portion of this space from the rate calculations even though it all is properly classified "common

use" space. CPA reduced the amount of space charged to SMA by approximately 29%. *Id.* There is thus also no basis for SMA's claim that charges for terminal space are unreasonable.[13]

III. SMA'S COMPLAINTS ABOUT CONSULTATION PROVIDE NO BASIS TO INVALIDATE CPA'S RATES AND CHARGES.

A. CPA Began Consulting With SMA On The Contested Rate Methodology Five Years Ago.

In 2015, CPA began to develop a new rate methodology for charging air carriers for the use of the Airports. The impetus for the new rate methodology was an unsuccessful effort by SMA to establish that the terminal fees that were being charged by CPA were excessive and constituted an illegal "head tax" under the Anti-Head Tax Act ("AHTA") because they were assessed on a per-passenger basis — even though they were established in accordance with

---

[13] SMA makes two other specific allegations of rate-setting errors. In ¶ 45(b) of its Complaint, SMA makes a puzzling assertion that CPA has somehow improperly included fuel-related costs in its computation of the fees that SMA challenges in this proceeding. Like many airport operators, the Authority recovers certain costs through a "Fuel Flowage Fee" that is levied on sellers of fuel. SMA does not sell any fuel and fuels its own aircraft, so SMA does not (directly or indirectly) pay any Fuel Flowage Fees to the Authority. *See* Ossege Decl., ¶ 18. The Authority's rates and charges for FY 2022 do not include the costs the Authority recovers through its Fuel Flowage Fee. The fuel costs that are recovered in the rates and charges disputed by SMA are related to vehicles or generators used by the Authority itself and allocated to the appropriate Airport cost centers. *Id*.

In ¶ 55 of its Complaint, SMA alleges that CPA is diverting airport revenue by making unlawful payments to the CNMI Office of the Public Auditor ("OPA"). In fact, while local laws might appear to require it to make such payments, CPA has not been doing so. Instead, CPA has prudently sought FAA's advice on the propriety of such payments. *See* Hofschneider Decl., ¶ 23 & Ex. CPA-15. The Authority has not actually made any such payments to the OPA for at least the past 15 years and does not plan to make such a payment to OPA in FY 2022 unless the FAA advises that it would be lawful to do so. CPA acknowledges that the budget that Ricondo used to calculate the Fiscal Year 2022 rates contained an allowance for such a payment to the OPA of $126,239 in the event that the FAA advises such a payment is lawful. If the FAA advises such a payment is not lawful, a credit to the airlines will be included in the year-end reconciliation of budgeted to actual costs for the year. With respect to alleged payments to the OPA in Fiscal Years 2018-2021, the OPA contribution was budgeted as an expense, but CPA has not made any such payments to the OPA. If the FAA advises that payments under our local legislation are not lawful, CPA will reconcile historical budgeted OPA expenses with the airlines, as appropriate. *See* Hofschneider Decl., ¶ 23.

CPA's Airline Use Agreement with each of the air carriers, including SMA. SMA's allegations were reviewed by FAA's local Airports Division Office ("ADO"). Hofschneider Decl. ¶ 4. The ADO found that "the cost allocation methodology applied to the airport rates and charges does not represent an illegal head tax," but recommended that CPA change its rate-setting terminology to avoid confusion in the future. *See* Hofschneider Decl. ¶ 4.

Even though FAA rejected SMA's claims, SMA continued to dispute the fees charged to SMA under the AUA. As a result, in 2015 CPA asked Ricondo to develop a new compensatory rate methodology that would both fairly distribute costs among the air carriers serving the Airports in accordance with applicable FAA requirements and to avoid the appearance of a "head tax" by assessing charges on the basis of square footage rather than passenger head-counts. CPA also asked Ricondo to develop a new form of "Operating Agreement" to implement the new rate methodology. Ricondo developed a new compensatory rate methodology and a new Operating Agreement to replace the existing AUA between CPA and the air carriers serving the Airports, including SMA. Hofschneider Decl. ¶ 6.

During July and November 2016, CPA and Ricondo representatives met with the air carriers serving the Airports to explain the new rate methodology and the new Operating Agreement. CPA had at least two meetings with SMA: one on July 19, 2016 and a later one on November 17, 2016. Before the July 19 meeting, CPA provided SMA with a detailed written explanation of the new rate methodology developed by Ricondo. *See* Hofschneider Decl. ¶ 6. When they met with SMA in July, 2016, CPA and Ricondo presented the new rate methodology and answered whatever questions SMA asked. During the November meeting, CPA presented the new form of "Operating Agreement," which included projected rates for Fiscal Year 2017

calculated using the new rate methodology. *See* Hofschneider Decl. & Ex. CPA-5. CPA and Ricondo again answered whatever questions SMA asked.

It was apparent to CPA at that time that SMA had carefully reviewed the 2016 Rate Study. SMA raised two primary objections to the new rate methodology: that the allowance for ARFF facilities was improper and that SMA should not be charged for security screening and circulation space that was not used by SMA's passengers. SMA pressed CPA to develop a rate methodology that would further reduce the costs of commuting between the islands, thereby advancing local interests. Hofschneider Decl. ¶ 11.

SMA was the only air carrier serving the Airports that refused to accept the new rate methodology and execute the form of Operating Agreement CPA had proposed. Nevertheless, in response to SMA's refusal to sign the Operating Agreement, the Authority's Board of Directors delayed the implementation of the Operating Agreement and new rate methodology. *Id.* ¶ 12. On August 22, 2017, Robert Christian, Board Chair at SMA, made a presentation to the Authority's Board of Directors. During his presentation, Mr. Christian conceded that CPA has the right to charge new fees calculated using the compensatory rate methodology Ricondo developed and documented in the 2016 Rate Study. This methodology is essentially the same as the methodology CVPA adopted five years later, as the Department can easily confirm by comparing the 2016 Rate Study (Ex. CPA-4) with the 2022 Rate Study (Ex. CPA-17). Mr. Christian urged, however, that CPA should instead develop a rate methodology that would further reduce the costs for airlines, such as SMA, that operate commuter flights to and from Tinian Island and Rota Island. Hofschneider Decl. ¶ 11 & Ex. CPA-6 at 11. Following that meeting, CPA continued for four years to delay implementation of the new rate methodology and

the Operating Agreement as a result of objections SMA raised over the impact of the new rate methodology on commuter airfares.

On May 27, 2021, the Authority's Board of Directors decided to move forward with the new rate methodology and adopted Board Resolution No. 2021-05. This resolution authorized the implementation of Ricondo's new rate methodology "through the termination of the existing Airline Use Agreements, the promulgation of amendments to the Authority's Airport Rules and Regulations, and the issuance of new Operating Permits."

On August 25, 2021, CPA sent written notice to SMA by hand delivery, terminating the AUA and instituting the new rate methodology through regulation, effective October 1, 2021. Hofschneider Decl. ¶ 19 & Ex. CPA-12. Termination of the AUA was consistent with and permitted by Section 6.01 of the AUA. Section 6.01 provides: "This Agreement may be terminated as of September 30th in each year by written notice from either party to the other given on or before August 31st of the year." Hofschneider Decl. ¶ 20 & Ex. CPA-13. The compensatory methodology used to calculate the new fees was no surprise to SMA. They have known that CPA was poised to adopt this method for the past five years. There is no basis for any claim of inadequate consultation.[14]

[14] The Department has encouraged consultation because it can sometimes resolve disputes. *See, e.g., LAX III* Instituting Order, at 28 ("[I]t is possible that all or part of a 47129 proceeding may be averted through a consultative process"). In this case there is no reason to believe that further consultation would have avoided this proceeding. SMA has been litigating against CPA tirelessly over fees for nearly a decade and currently has a local lawsuit pending against CPA in the midst of all this. Hofschneider Decl. ¶¶ 4-5, 15-16. Further consultation with SMA would have been futile. SMA has challenged CPA's fees in every forum it can find even though SPA has conceded that CPA's rate methodology is lawful. Hofschneider Decl. ¶¶ 4-5, 15-16. SMA has never prevailed in any of its challenges, but it has refused to pay *any* fees for more than six years and currently owes CPA millions of dollars. *Id.* ¶¶ 4-5, 15-16, 24.

B. The Department has no Authority to Invalidate CPA's Rates and Charges Policy for Want of Consultation.

Even if the Department were to find there is a "significant dispute" here (which it should not do) and that CPA should have consulted more with SMA, the Department has no authority to invalidate otherwise reasonable fees for want of adequate consultation. While airport sponsors, including CPA, routinely consult with airlines about their rate-serving methods, airport sponsors have no statutory obligation to do so. As FAA recites, "[t]he Department **encourages** direct resolution of differences at the local level between aeronautical users and the airport proprietor. Such resolution is best achieved through adequate and timely consultation between the airport proprietor and the aeronautical users about airport fees." Rates and Charges Policy at ¶ 1.1 (emphasis added). The Rates and Charges Policy does catalog in Appendix 1 various information "that the Department considers would be useful to…carriers." *Id.* at ¶ 1.1.2 & App. 1 ("The Department of Transportation **ordinarily expects** the following information to be available to aeronautical users….") (emphasis added). But the Department has never purported to **require** airport sponsors to consult on rates and fees.

The Department has previously acknowledged the aspirational nature of FAA's preference for consultation. In its Instituting Order in *LAX II*, it observed that although "[o]ne of the most important goals in the Policy Statement is the encouragement for the negotiations between airports and airlines on the establishment of new fees . . . it is unclear that [the Department] could direct an airport under 49 U.S.C. 47129 to cancel a new fee or fee increase on the basis of the airport's refusal to consult, if the fees were otherwise reasonable." *LAX II*, Instituting Order, at 18. In its Final Decision in *LAX II*, the Department reiterated that § 47129 "d[oes] not clearly authorize [it] to direct an airport to cancel a new fee or fee increase on the basis of the airport's refusal to consult, if the fees were otherwise reasonable." *LAX II*, Final

Decision, Order 95-12-33, at 14 (Dec. 22, 1995). And in *LAX III*, the Department again noted that it "is reluctant to invalidate the increased fees on the basis of lack of adequate consultation." *LAX III*, Instituting Order at 28. The Department has never invalidated a contested rate for want of adequate consultation, and it should not do so in this proceeding.

Conclusion

For all these reasons, and on the basis of the evidence offered by CPA, the Department should dismiss the Complaint because it does not present a "significant dispute." If the Department nevertheless proceeds to hear this case, the Department should rule that the CPA's rate methodology and the fees it produced for FY 2022 are reasonable and lawful.

November 5, 2021

Respectfully submitted,

ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, Massachusetts 02109
T: 617.621.6500
F: 617.621.6639
E: slewis@andersonkreiger.com
troskelley@andersonkreiger.com
mmakarious@andersonkreiger.com
pkominers@andersonkreiger.com
edunkle-polier@andersonkreiger.com

By: */s/ Ezra Dunkle-Polier*
EZRA DUNKLE-POLIER

Robert T. Torres
TORRES LAW GROUP
Plata Drive
Whispering Palms (Chalan Kiya)
P.O. Box 50375 CK
Saipan, MP 96950
T: 670.234.7859
F: 670.234.5749
E: robert.torres@rttlawgroup.com

Counsel for Commonwealth Ports Authority